BU Developments Sdn Bhd v Selangor Appeal Board & Ors

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NO 25–169–12 OF 2012
VERNON ONG J
30 JULY 2013

Civil Procedure — Judicial review — Application for — Principles to which a reviewing court should scrutinise decision in question — Whether reviewing court may go into merits of decision — Whether court interfere with exercise of power or discretion

Local Government — Town planning — Application for planning permission — Judicial review against refusal of planning permission — Irrelevant issues taken into consideration — Appeals board raising and considering issues not raised by objecting party — Applicant not given opportunity to adequately prepare and answer new issues raised — Perception given that appeals board was partial towards objecting party — Apparent bias and lack of impartiality on the part of appeals board — Whether decision tainted with procedural impropriety

The applicant was the registered proprietor of the land ('the applicant's land'). The second respondent was the registered proprietor of a land adjacent to the applicant's land. The applicant's land was connected to the Middle Ring Road 2 ('MRR2'). The applicant submitted to the third respondent an application to develop the applicant's land. The second respondent objected to the proposed development. After hearing the objections, the third respondent approved the applicant's application for planning permission. Dissatisfied with the third respondent's decision the second respondent filed an appeal to the first respondent ('the board'). On the first hearing, the chairman of the board adjourned the hearing pending feedback from JKR regarding the consent to allow the applicant to connect to MRR2. The chairman intimated to the parties that the appeal may be decided in favour of the second respondent on this question alone. Subsequently, after hearing submissions, the board adjourned the appeal for decision on 16 May 2012. On 16 May 2012, Pn Hajjah Norasiah bt Yahya (a member of the board who was hearing the appeal) raised the issue that the proposed development report ('DPR') submitted for the proposed development was not in compliance with the requirements of the Town and Country Planning Act 1976 ('Act') and that the second respondent's appeal will be allowed on this ground alone. The applicant came to know that Puan Noraishah had called the third respondent's planning officer to request for a copy of the DPR submitted for the proposed development. This request was without the applicant's knowledge and the issue of the DPR was not raised

by the second respondent during the hearing. Nevertheless, the applicant produced documents to clarify the issue on the DPR. The board also raised the issue of whether the Traffic Impact Assessment Report was incomplete. The matter which was fixed for decision was thereafter adjourned several times by the board. The board then allowed the second respondent's appeal and set aside the planning permission. Hence this application for judicial review of the board's decision. The application for judicial review was grounded on the following grounds: (i) that the board went out of its way to come up with purported reasons to allow the second respondent's appeal; (ii) that the board of its own accord raised issues not raised by the second respondent; (iii) that the board without any reasonable ground completely failed to consider the explanations given by the applicant's experts; and (iv) that the board conducted themselves in such a manner as to give the appearance or impression that the appeal before the board was an appeal or a dispute between the board on the one part and third respondent on the other part.

Held:

(1) The remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of certiorari where: (i) that body has acted without jurisdiction; or (ii) that body has exceeded its jurisdiction; or (iii) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (iv) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense (see para 39).

(2) The principles to which a reviewing court should scrutinise included the following matters: (i) the decision making process where the impugned decision is flawed on the ground of procedural impropriety; (ii) the merits where the decision is grounded on illegality or plain irrationality; (iii) the findings where the facts do not support the conclusion arrived at by a tribunal; or (iv) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration. Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (see paras 40–41).

(3) The board took the unusual step of intimating to the parties at the

hearing of the appeal that the appeal may be decided in favour of the second respondent on the question of whether the third respondent had obtained the consent of JKR to allow the applicant to connect to MRR2. It ignored the fact that the issue was not relevant or material to the appeal (see para 54).

(4) The fact that Puan Noraishah had called the third respondent's planning officer and obtained a copy of the DPR without the knowledge of the applicant called into question the propriety of the same. The fact that the issue regarding the DPR was not raised by the second respondent also did not factor in the consideration of the board (see para 55).

(5) The decision date on 19 June 2012 was yet again adjourned to 2 August 2012 — this time on the new ground that the board needed further clarification and on whether the applicant's land was located in an environmentally sensitive area. To compound the impropriety, the board once again adjourned the decision to 10 September 2012 — this time on three issues relating to DPR's compliance with s 21A of the Act, compliance with comments made by IKRAM and incomplete TIA report. None of these three issues were raised by the second respondent (see para 56).

(6) The applicant was not given an opportunity to adequately prepare and answer the new issues which were raised by the board on its own accord. The board gave the perception that it was partial towards the second respondent. The decision making process at the hearing of the appeal before the board had offended against the rule against bias. The board had embarked on a course outside the purview of its statutory role and function as an appeal body to the extent that there was an apparent bias and lack of impartiality on its part (see para 57).

(7) The decision of the board was tainted with procedural impropriety on account of the apparent bias in favour of the second respondent. The decision was also illegal as it was tainted errors of jurisdiction in the decision making process — when it asked itself the wrong questions and took into account matters which it was not required to consider. The board's decision was also flawed in the sense that it was also based on considerations which had been accorded undue weight and which on the evidence appeared to be illogical and arbitrary (see para 68).

[Bahasa Malaysia summary

Pemohon adalah tuan punya berdaftar tanah ('tanah pemohon'). Responden kedua adalah tuan punya berdaftar tanah bersebelahan tanah pemohon. Tanah pemohon berhubung dengan Lebuhraya Lingkaran Tengah ('MRR2'). Pemohon telah mengemukakan kepada responden ketiga satu permohonan untuk memajukan tanah pemohon. Responden kedua telah membantah cadangan pembangunan itu. Selepas mendengar bantahan itu, responden

ketiga telah meluluskan permohonan pemohon untuk kebenaran perancangan. Berasa tidak puas hati dengan keputusan responden ketiga responden kedua telah memfailkan rayuan terhadap responden pertama ('Lembaga tersebut'). Dalam perbicaraan pertama pengerusi lembaga tersebut telah menangguhkan perbicaraan tersebut sementara menunggu maklum balas daripada JKR berhubung persetujuan untuk membenarkan permohonan untuk dihubungkan dengan MRR2. Pengerusi memberitahu pihak-pihak bahawa rayuan tersebut boleh diputuskan menyebelahi responden kedua atas persoalan ini sahaja. Berikutan itu, selepas mendengar hujah-hujah, lembaga tersebut menangguhkan rayuan itu untuk keputusan pada 16 Mei 2012. Pada 16 Mei 2012, Pn Hajjah Norasiah bt Yahya (seorang ahli lembaga tersebut yang mendengar rayuan) telah menimbulkan isu bahawa laporan cadangan pembangunan ('LCP') yang dikemukakan untuk cadangan pembangunan itu tidak mematuhi keperluan-keperluan Akta Perancangan Bandar dan Negeri 1976 ('Akta') dan bahawa rayuan responden kedua akan dibenarkan atas alasan ini sahaja. Pemohon telah mengetahui bahawa Puan Noraishah telah memanggil pegawai perancangan responden ketiga untuk meminta sesalinan LCP yang dikemukakan untuk cadangan pembangunan itu. Permintaan ini adalah tanpa pengetahuan pemohon dan isu LCP itu tidak ditimbulkan oleh responden kedua semasa perbicaraan. Walaupun begitu, pemohon telah mengemukakan dokumen-dokumen untuk menjelaskan isu berhubung LCP itu. Lembaga tersebut juga menimbulkan isu sama ada Laporan Penilaian Kesan Lalu Lintas ('LPKLL') itu tidak lengkap. Perkara itu yang telah ditetapkan untuk keputusan telah ditangguh beberapa kali oleh lembaga tersebut. Lembaga tersebut kemudian membenarkan rayuan responden kedua dan mengetepikan kebenaran perancangan. Justeru permohonan ini untuk semakan semula berhubung keputusan lembaga tersebut. Permohonan untuk semakan semula berasaskan alasan-alasan berikut: (i) bahawa lembaga tersebut bersusah payah mencari alasan bagi maksud tersebut untuk membenarkan rayuan responden kedua; (ii) bahawa lembaga tersebut dengan sendiri telah menimbulkan isu-isu yang tidak ditimbulkan oleh responden kedua; (iii) bahawa lembaga tersebut tanpa apa-apa alasan munasabah gagal untuk mengambil kira penjelasan-penjelasan yang diberikan oleh pakar-pakar pemohon; dan (iv) bahawa lembaga tersebut telah bertindak dalam cara yang memberi gambaran atau anggapan bahawa rayuan di hadapan lembaga tersebut adalah rayuan atau pertikaian antara lembaga tersebut di satu pihak dan responden ketiga di pihak yang lain.

Diputuskan,

(1) Remedi semakan semula tiada kaitan dengan menyemak semula merit-merit keputusan di mana permohonan semakan semula dibuat. Sebaliknya, remedi semakan semula terutamanya adalah semakan semula untuk proses membuat keputusan. Dalam melaksanakan peranan ini mahkamah bersidang dalam bidang kuasa sebagai pengawasan dan

bukan dalam bidang kuasa rayuannya. Mahkamah tidak akan campur tangan dengan pelaksanaan mana-mana kuasa atau budi bicara yang telah diberikan kepada mahkamah bawahan, tribunal pentadbiran atau badan berkuasa awam yang lain. Walau bagaimanapun, keputusan badan itu boleh dibatalkan oleh perintah certiorari di mana: (i) badan itu telah bertindak tanpa bidang kuasa; atau (ii) badan itu telah melampaui bidang kuasanya; (iii) badan itu telah gagal mematuhi rukun keadilan asasi dalam kes di mana rukun tersebut terpakai; atau (iv) terdapat kesilapan undang-undang di atas rekod atau keputusan itu tidak munasabah dalam maksud *Wednesbury* (lihat perenggan 39).

(2) Prinsip-prinsip yang patut diteliti oleh mahkamah yang menyemak semula hendaklah termasuk perkara-perkara berikut: (i) proses membuat keputusan di mana keputusan yang dipersoalkan adalah cacat atas alasan prosedur yang tidak teratur; (ii) merit-merit di mana keputusan adalah berasaskan yang tidak sah atau tidak rasional langsung; (iii) penemuan-penemuan di mana fakta tidak menyokong kesimpulan yang dibuat oleh tribunal; atau (iv) penemuan di mana penemuan tribunal telah dibuat dengan mengambil kira perkara-perkara tidak relevan, dan telah gagal mengambil kira perkara-perkara yang relevan. Walau apapun, kuasa untuk semakan semula suatu keputusan atas meritnya bukan suatu yang mutlak. Dalam kes-kes yang melibatkan polisi awam, kepentingan masyarakat, keselamatan awam atau keselamatan negara, ia adalah tidak wajar untuk meneliti merit-merit atau keputusan semasa permohonan semakan semula kehakiman (lihat perenggan 40–41).

(3) Lembaga tersebut telah mengambil langkah yang luar biasa dengan memberitahu pihak-pihak semasa perbicaraan rayuan itu bahawa rayuan itu mungkin diputuskan menyebelahi responden kedua atas persoalan sama ada responden ketiga telah memperolehi persetujuan JKR bagi membenarkan pemohon untuk dihubungkan dengan MRR2. Ia tidak menghiraukan fakta bahawa isu itu tidak relevan atau penting kepada rayuan itu (lihat perenggan 54).

(4) Fakta bahawa Puan Noraishah telah memanggil pegawai perancangan responden ketiga dan memperoleh sesalinan LCP tanpa pengetahuan pemohon itu perlu dipersoalkan juga. Fakta bahawa isu berkaitan LCP itu tidak ditimbulkan oleh responden kedua juga tidak diambil kira dalam pertimbangan lembaga tersebut (lihat perenggan 55).

(5) Tarikh keputusan pada 19 Jun 2012 telah ditangguh kepada 3 Ogos 2012 — kali ini atas alasan baru bahawa lembaga tersebut memerlukan penjelasan lanjut dan berhubung sama ada tanah pemohon terletak dalam kawasan yang mementingkan alam sekitar. Bagi mengkompaun perbuatan yang tidak elok itu, lembaga tersebut sekali lagi menangguhkan keputusan itu kepada 10 September 2012 — kali ini berhubung tiga isu berkaitan pematuhan LCP dengan s 21A Akta,

pematuhan dengan komen-komen yang dibuat oleh IKRAM dan laporan TIA yang tidak lengkap. Ketiga-tiga isu tersebut tidak ditimbulkan oleh responden kedua (lihat perenggan 56).

(6) Pemohon tidak diberikan peluang untuk menyediakan dan menjawab dengan sewajarnya isu-isu baru yang telah ditimbulkan oleh lembaga tersebut atas kehendaknya sendiri. Lembaga tersebut telah memberi persepsi bahawa ia menyebelahi responden kedua. Proses membuat keputusan semasa perbicaraan rayuan di hadapan lembaga tersebut telah melanggar rukun berat sebelah. Lembaga tersebut telah bertindak di luar skop peranan dan fungsi statutorinya sebagai badan rayuan sehingga wujud berat sebelah yang nyata dan ketidaksamaan di pihaknya (lihat perenggan 57).

(7) Keputusan lembaga tersebut telah dicemari prosedur salah berdasarkan sikap berat sebelah yang nyata menyebelahi responden kedua. Keputusan itu juga tidak sah kerana mempunyai kesilapan bidang kuasa dalam proses membuat keputusan — apabila ia bertanyakan sendiri soalan salah dan mengambil kira perkara-perkara yang tidak perlu dipertimbangkan. Keputusan lembaga tersebut juga cacat kerana ia juga berasaskan pertimbangan yang tidak wajar dan berdasarkan keterangan dilihat tidak logik dan dibuat sewenang-wenangnya (lihat perenggan 68).]

Notes

For a case on application for judicial review, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5113.

For cases on application for planning permission, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 203–204.

Cases referred to

Anisminic Ltd v The Foreign Compensation Commission & Another [1969] 1 All ER 208, HL (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, CA (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)

Hong Leong Equipment v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Kumpulan Perangsang Selangor v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493, CA (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)
Michael Lee Fook Wah v Menteri Sumber Manusia, Malaysia & Anor [1998] 1 MLJ 305, CA (refd)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)
Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507, CA (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Petroliam National Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2000] 2 AMR 2265, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Ram Singh v Bright Steel Sdn Bhd [1988] 3 MLJ 33, SC (refd)
Ranjit Kaur a/p Gopal Singh v Hotel Excelsior [2010] 6 MLJ 1; [2010] 8 CLJ 1, FC (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390, HC (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289; [1988] 3 CLJ 85, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2)
Federal Constitution Part II
Rules of Court 2012 O 53 r 2(2)
Specific Relief Act 1950 s 44
Town and Country Planning Act 1976 ss 13(1), 21, 21(6), 21A, 21B, 22(2), 36

Sabariah bt Abdulah for the appellant.
B Thangaraj (Thangaraj & Associates) for the respondent.

Vernon Ong J:

[1] On 9 May 2013, the court made an order of certiorari to quash the whole of the decision of the Selangor Appeal Board dated 10 September 2012 and issued an order of mandamus directing the Ampang Jaya Municipal Council to process all plans and development proposals submitted by the applicant as allowed in the Ampang Jaya Municipal Council local plan. The grounds of the decision are as follows:

BRIEF ACCOUNT OF THE SALIENT FACTS

[2] On the basis of the evidence as disclosed in the affidavits filed by the parties to the proceedings, the following facts are uncontroverted.

[3] The applicant is the registered proprietor of the land known as Lot 322 GM 53, Mukim of Hulu Kelang, District of Gombak, Selangor Darul Ehsan (the applicant's land).

[4] The first respondent (Selangor Appeal Board) is a board incorporated under s 36 of the Town and Country Planning Act 1976 ('TCPA') to hear appeals from decisions of the third respondent (Ampang Jaya Municipal Council). The members of the appeal board who heard the appeal on behalf of the Selangor Appeal Board comprised of (i) Dato' Abu Bakar bin Awang (Chairman), (ii) Pn Hajjah Norasiah bt Yahya (member); and Datin Teh Zahawir bt Abdul Malek (member).

[5] The second respondent is the registered proprietor and owner of the land bearing postal address No 1, Lorong 7A, Taman Sri Ukay, 68000 Ampang, Selangor and which land is adjacent to the applicant's land.

[6] The third respondent is a local government empowered to consider a planning application under s 22(2) of the TCPA for the municipality of Ampang Jaya.

[7] The applicant's land comes under the Ampang Jaya Municipal Council administrative area. It is located approximately 3km from Ampang town centre and 9km from the Kuala Lumpur city centre. It is also adjacent to the residential development areas known as Villa Sri Ukay and Taman Sri Ukay. The applicant's land is connected to the Middle Ring Road 2 ('MRR2') which is located west of the applicant's land.

[8] On 25 September 2009, the applicant submitted the application to develop the applicant's land. The application included a Traffic Impact Assessment Report from Kumpulan Perunding Maju Teknik Sdn Bhd ('TIA report') and a Geological Terrain Mapping Report from Geo-Excel Consultants Sdn Bhd ('Geotechnical report'). The application was processed by the Ampang Jaya Municipal Council's One Stop Centre and was submitted to all the relevant departments and agencies for their comments on whether they are any objections. The applicant obtained approvals from all the relevant departments and agencies.

[9] Whilst the applicant's planning permission was being processed,

pursuant to s 13(1) of the TCPA, Ampang Jaya Municipal Council made the draft local plan available at its office for public inspection and for any objections to be made in respect of the draft local plan.

[10] On 12 November 2009, the applicant made an objection against the Land Use Classes which effectively categorised the applicant's land as part residential and part commercial. The applicant had requested for the applicant's land to be amended to commercial use only. The second respondent did not raise any objections during this stage and did not take part in the proceedings.

[11] Pending the consideration of the applicant's planning permission, and whilst the local plan was still in draft stage, Ampang Jaya Municipal Council issued a Notice under s 21(6) of the TCPA to 62 neighbouring land owners informing of their right to object to the applicant's application for planning permission.

[12] By a letter dated 28 January 2010, the second respondent stated her objections against the proposed development. Objections were also made by Villa Sri Ukay residents.

[13] On 23 March 2010, Ampang Jaya Municipal Council issued a letter calling for objections hearing on 3 March 2010 to all individuals who have raised objections. Altogether three dialogue sessions were held to hear the objections of the neighbouring landowners — (i) on 3 March 2010; (ii) on 26 March 2010; and (iii) on 2 April 2010. The second respondent objected to the proposed development on the applicant's land. The chairman of the Villa Sri Ukay Residents Association supported the applicant's application to develop the applicant's land.

[14] On 23 March 2010, Ampang Jaya Municipal Council (formalised by way of planning permission in Form C(1) dated 27 April 2011) approved the applicant's application for planning permission for the following development:

(a) Block A

(i) one storey basement car park;

(ii) one storey car park and business centre;

(iii) one storey shopping centre.

(b) Block B

(i) one storey basement car park;

(ii) three storey shop offices with mezzanine floor

(c) Block C

(i) one storey basement car park;

(ii) six storey shop offices

('the proposed development')

[15] Dissatisfied with Ampang Jaya Municipal Council's decision the second respondent filed an appeal to the Selangor Appeal Board.

[16] Meanwhile, the Ampang Jaya Municipal Council local plan was *gazetted* on 26 May 2011. Under the local plan, the applicant's land is earmarked for commercial use.

Proceedings before Selangor Appeal Board

[17] On the first hearing date (9 November 2011), the chairman of the Selangor Appeal Board informed all parties present that Ampang Jaya Municipal Council had failed to give their response to the questions raised by the second respondent in respect of approval from Federal Public Works Department ('JKR Persekutuan') as the consent to allow the applicant to connect to MRR2 which is a federal road was only obtained by Ampang Jaya Municipal Council from the Selangor Public Works Department ('JKR Selangor') since MRR2 is a federal road. The hearing was then adjourned pending feedback from JKR Selangor.

[18] The Selangor Appeal Board's chairman also intimated to the parties present that the appeal may be decided in favour of the second respondent on this question alone. The applicant's solicitor informed the Selangor Appeal Board that the question was not a planning issue under the jurisdiction of the Selangor Appeal Board as the question of consent from JKS Selangor is an internal question between JKR Selangor and JKR Persekutuan. Nevertheless, the applicant's solicitors requested for time and was granted time by Selangor Appeal Board to obtain feedback from JKR Selangor on the issue. The hearing of the appeal was adjourned pending JKR Selangor's feedback.

[19] The applicant then procured the Director of JKR Selangor one Dato' Ir Abdullah bin Abd Rahman to affirm an affidavit clarifying that there was a delegation of power to the Director of JKR Selangor to give approval for federal roads located in Selangor.

[20] The hearing then proceeded on 11 April 2012 and decision fixed on 16 May 2012. After hearing of oral submissions from all parties, the Selangor

Appeal Board adjourned the appeal for decision on 16 May 2012. Meanwhile, parties were requested to file in their written submissions.

[21] On 16 May 2012, the Selangor Appeal Board through Pn Hajjah Norasiah bt Yahya raised the issue that the proposed development report ('DPR') submitted for the proposed development was not in compliance with the requirements of the TCPA and that the second respondent's appeal will be allowed on this ground alone.

[22] In the meantime, the applicant was informed by one Encik Nor Halim bin Ahmad a town planner appointed by the applicant that Puan Hajjah Noraishah bt Yahya a member of the appeal board that had called Ampang Jaya Municipal Council's planning officer one Puan Zuraina bt Said to request for a copy of the proposed development report ('DPR') submitted for the proposed development. (This request was without the applicant's knowledge and the issue of the DPR was not raised by the second respondent during the hearing.)

[23] On 16 May 2012 being the date fixed for decision, Selangor Appeal Board raised the issue of DPR. Puan Hajjah Noraishah binti Yahya said that the DPR for the proposed development was not in compliance with the requirements of TCPA and that the second respondent's appeal will be allowed on this ground alone.

[24] Since the issue relating to the DPR was a new issue raised by Selangor Appeal Board, the applicant objected to the same and asked for time to file new evidence and documents to respond to the question raised. The matter was then fixed for decision on 19 June 2012.

[25] In the meantime, the applicant produced documents to clarify the issue on the DPR raised by Selangor Appeal Board. The second respondent adopted the issue on the DPR and filed additional documents.

[26] On 19 June 2012, the Selangor Appeal Board informed all parties present that it had not reached a decision after reading the further affidavits and documents submitted. It requested for further clarification in respect of the DPR's compliance with the provisions of TCPA and whether the applicant's land is located in an Environmentally Sensitive area. The decision was yet again adjourned — to 2 August 2012.

[27] On 2 August 2012, the Selangor Appeal Board did not deliver its decision. Instead, it raised new issues relating to (i) the DPR's compliance with s 21A of the TCPA; (ii) whether there was compliance with the comments

made by IKRAM; and (iii) whether the TIA report is incomplete. The decision was once again adjourned to 10 September 2012.

[28] Pending the decision date on 10 September 2012, the applicant responded in writing to the issues raised by Selangor Appeal Board. Further, the applicant filed a number of witness statements in response to the issues raised by the second respondent.

[29] On 10 September 2012, Selangor Appeal Board decided to allow the second respondent's appeal and set aside the planning permission in Form C(1) dated 27 April 2011 and the layout plan Reference No JPC/P09/182/Sel-GBK/108.

[30] On 5 November 2012, Selangor Appeal Board sent Form H by enclosing Order dated 10 September 2012 in with second respondent's appeal was allowed solely on the following ground:

> … ADALAH DIDAPATI bahawa Laporan Cadangan Pemajuan (LCP) yang dikemukakan oleh pihak Pencelah kepada pihak Responden sebagai Pihak Berkuasa Tempatan tidak mematuhi peruntukan Seksyen 21A dan 21B(1), Akta Perancangan Bandar dan Desa 1976 (Akta 172) kerana gagal mematuhi dasar dan garispanduan di dalam menganalisa gunatanah tapak cadangan serta Pelan Susunatur tidak mengandungi butir-butir yang ditentukan di dalam Seksyen 21B iaitu langkah-langkah bagi melindungi dan memperelokkan alam sekitar dari segi fizikal dan memelihara topografi semulajadi bagi kawasan yang hendak dilaksanakan.
>
> (… IT IS HEREBY THE FINDING OF THE BOARD that the proposed development Report (LCP) submitted by the Intervener to the Respondent as the Local Authority did not comply with the provisions of Sections 21A and 21B(1) of the Town and Country Planning Act 1976 (Act 172) as it failed to comply with the policies and guidelines in analysing the proposed site land use and that the Layout Plan also did not contain the prescribed particulars set out in Section 21B, which are the measures to protect and improve the environment from a physical aspect and preserving the natural topography for the area to be implemented …)
>
> (English translation by applicant)

PRIMARY GROUNDS OF APPLICATION FOR JUDICIAL REVIEW

[31] This application is grounded on three principal grounds:

(a) that there was clear and apparent bias in conduct of the Selangor Appeal Board during the appeal proceedings;

(b) the Selangor Appeal Board had acted in error of jurisdiction; and

(c) the Selangor Appeal Board had acted in error of fact and law.

A JUDICIAL REVIEW IN MALAYSIA

[32] Judicial review is a branch of law dealing with administrative law. In its traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507).

[33] The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para 1 of the Schedule to s 25(2) of the CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, *quo warranto* and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In fact, an application for judicial review may include a prayer for a declaration (O 53 r 2(2) of the ROC 2012). In the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the court is usually called upon to make an order for mandamus, prohibition or certiorari. An order of certiorari has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any ultra vires exercise of powers. An order of mandamus is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law (see s 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.

Distinction between public law proceedings and private law proceedings

[34] Underlying the distinct nature of an application for judicial review is the requirement in Malaysian common law to have regard to the interest of good administration. In order to appreciate this concept, it is essential to draw a distinction between public law proceedings and private law proceedings.

[35] In private law proceedings, it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome. Be that as it may, the public as a whole are concerned only that private law proceedings should provide a fair and efficient manner of resolving disputes between individuals and of enforcing the rights of one individual over another.

[36] In contrast, public law proceedings usually affect many members of the public or even the public at large as well as the parties to the proceedings (eg

decisions of public bodies concerning *Orang Asli* native land rights, environment issues, planning permission, public nuisance, etc). Other members of the public will be interested to a lesser extent, whether financial or otherwise. However, there are also public law proceedings which do not usually affect the members of the public. A common example of this involves a person's application to quash the decision of the Industrial Court dismissing his claim for reinstatement on the ground of unlawful dismissal. In these cases, the court will be largely, if not exclusively, concerned with the merits of the application alone. Both sets of proceedings are treated as public law proceedings because the decision is taken by a public body performing a public duty. Typically, the public bodies *qua* respondents in an application for JR would be the Ministry of Human Resource, Minister of Home Affairs, Registrar of Societies, State Executive Council, Registrar of Land and Mines, BURSA Malaysia, Securities Commission, Government departments (such as Immigration, Royal Customs, Royal Malaysian Police), tribunals (such as Housing Tribunal, Consumer Claims Tribunal), statutory bodies (Malaysian Medical Council, Lembaga Akitek Malaysia), Service Commissions, Director General of Inland Revenue, Majlis Agama Islam and the Appeal Board constituted under the Town and Country Planning Act 1976, to name a few.

[37] As a general rule, the court has to take into account not only the interests of the applicant and the respondent but also the interests of the public as a whole in good administration.

[38] Judicial review is therefore primarily concerned with enforcing public duties on behalf of the public as a whole. In this sense, the court's concern with vindicating the interests of the individual is part of the process of ensuring that public bodies do not act unlawfully and that they do perform their public duties.

PRINCIPLES OF JUDICIAL REVIEW

[39] At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction (*Michael Lee Fook Wah v Menteri Sumber Manusia, Malaysia & Anor* [1998] 1 MLJ 305). The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of certiorari where (i) that body has acted without jurisdiction; or (ii) that body has exceeded its jurisdiction; or (iii) body has failed to comply with the rules of natural justice in a case where the rules are

applicable; or (iv) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether certiorari will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made ultra vires, unfairly or unjustly in the exercise of the discretion. In dealing with this application for judicial review there are fundamental principles to be applied within regard the principles enunciated by the Court Of Appeal in a case involving a judicial review of an award of the Industrial Court are instructive. In *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493 (CA) at p 511 Mohd Ghazali JCA (later FCJ) said:

> From the authorities discussed above, I would think that *in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind:*
>
> (a) *judicial review is not an appeal from a decision but a review of the matter in which the decision was made;*
>
> (b) *the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;*
>
> (c) *the High Court through judicial review, should not introduce technicalities of the court of law* to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
>
> (d) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal.
>
> (e) *the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;*
>
> (f) *the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.*
>
> (Emphasis added.)

[40] Against the backdrop of the Court of Appeal's decision in *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam*, in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 (FC) the Federal Court held that the distinction between review and appeal no longer holds.

The principles to which a reviewing court should scrutinise included the following matters:

(a) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;

(b) the merits where the decision is grounded on illegality or plain irrationality;

(c) the findings where the facts do not support the conclusion arrived at by a tribunal; or

(d) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

[41] Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 (FC); *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 (FC)).

[42] In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

(a) procedural impropriety;

(b) iIllegality; and

(c) iIrrationality.

Procedural impropriety

[43] This is a classic case of review of the decision making process. It addresses the decision making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure

to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169; *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1988] 3 CLJ 85 (CA); *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390).

Illegality

[44] This involves a review of the decision making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and *Anisminic* error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Ranjit Kaur a/p Gopal Singh v Hotel Excelsior* [2010] 6 MLJ 1; [2010] 8 CLJ 1). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by mala fide. The decision making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; *Hong Leong Equipment v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2000] 2 AMR 2265).

[45] Lack of jurisdiction may arise in circumstances where a tribunal ask itself the wrong question; or take into account matters which it was not directed or required to take into account; or may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. (*Anisminic Ltd v The Foreign Compensation Commission & Another* [1969] 1 All ER 208 at pp 213–214).

Irrationality

[46] Under this ground, the issue is not whether the decision maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test). The question to be determined is whether the power under which the decision

maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

[47] A decision which falls on this ground is said to have failed the *'Wednesbury unreasonableness' test* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*).

[48] The Federal Court adopted this principle in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (FC). In that case the registered owner of a piece of freehold land (title in perpetuity) applied to the Federal Government for sub division of the land and for conversion of the express condition relating to the use of a hotel for which planning permission had been granted. The registered owner was informed that the application would be approved on condition that after surrendering the land, the registered owner would receive back a lease of 99 years instead of title to the land in perpetuity. The registered owner applied to court for an order that the approving authority approve its application for subdivision upon the usual terms and conditions. The High Court gave judgment for the registered owner. On appeal the Federal Court held that the approving authority had no power to make the registered owner/applicant give up its freehold title and receive in exchange a 99 year lease. The condition was set aside. The condition in question which the registered owner objected to did not relate to the permitted development, it was unreasonable and was used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which only leases not titles in perpetuity are granted. At p 146 Suffian LP reiterated the following principles:

> I am of the opinion that English cases afford principles that may be followed here. What are the principles? They are:
>
> (a) The approving authority does not have an uncontrolled discretion to impose whatever condition it likes.
>
> (b) The conditions, to be valid, must fairly and reasonably relate to the permitted development.
>
> (c) The approving authority must act reasonably and planning conditions must be reasonable.

(d) The approving authority is not at liberty to use its power for an ulterior object, however, desirable that object may seem to it in the public interest.

…

In reconsidering these applications, the Committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested that on the part of the Committee. There must be no unreasonableness, no attention to extraneous circumstances, no disregard to public policy, and things of that sort - things mentioned by Lord Greene M.R., at page 682 in *Associated Provincial Picture House v Wednesbury Corporation*.

[49] At p 148, Raja Azlan Shah Ag CJ (Malaya) (as HRH then was) said:

…. On principle and authority, the discretionary power to impose such conditions as they think fit is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture House v Wednesbury Corporation* have regard to all relevant considerations and disregard all improper considerations, they must produce a result which does not offend against common sense: or to repeat Lord Denning MR's words in *Pyx Granite Co Ltd v Ministry of Housing and Local Governmen*t, approved in *Fawcett Properties Ltd v Buckingham County Council* the conditions to be valid must fairly and reasonably relate to the permitted development. The dictum of Lord Denning MR has been frequently quoted and followed in these matters. See *R v Hillingdon Council, Ex parte Royco Homes Limited*. Lord Denning said (p 572):

The principles to be applied are not, I think in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit'. Nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

…

… Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonable. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place', (per Dankwerts LJ in *Bradbury v London Borough of Enfield*.)

FINDINGS OF THE COURT

[50] At the outset, it is pertinent to note that Ampang Jaya Municipal Council has no objection to the application for judicial review and agrees with the relief sought to be granted except that in respect of prayer (b), AMJC maintains that the word 'approve' be substituted with 'process' so that prayer (b) be amended to read as follows:

> An order of Mandamus such that after the first respondent's decision dated 10th September 2012 is set aside, the decision of the third respondent contained in the Planning Permission in Form C(1) dated 27th April 2011 and the Layout Plan Reference Number JPC/P09/182/Sel-GBK/108 be maintained and that the third respondent shall process all plans and development proposals submitted by the applicant as allowed in the Ampang Jaya Municipal Council local plan.

First ground – whether there was bias on the part of Selangor Appeal Board

[51] Learned counsel for the applicant submitted that there was clear and apparent bias on the part of Selangor Appeal Board is evident from the following:

(a) the fact that Selangor Appeal Board went out of its way to come up with purported reasons to allow the second respondent's appeal;

(b) the fact that Selangor Appeal Board of its own accord raised issues not raised by the second respondent;

(c) the fact that Selangor Appeal Board without any reasonable ground completely failed to consider the explanations given by the applicant's experts; and

(d) the fact that Selangor Appeal Board conducted themselves in such a manner as to give the appearance or impression that the appeal before the Selangor Appeal Board was an appeal or a dispute between Selangor Appeal Board on the one part and Ampang Jaya Municipal Council on the other part.

[52] In support of the abovementioned, learned counsel cited *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Dengan Tanggungan* [1999] 3 MLJ 1; *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd*; *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501; and *Ram Singh v Bright Steel Sdn*

Bhd [1988] 3 MLJ 33.

Decision

[53] Judicial review is essentially a review of the decision making process, to ascertain if it satisfied the test of procedural fairness with reference to the subject matter in question and the TCPA. It is therefore necessary to commence with an examination of the decision making process at the hearing of the appeal by the Selangor Appeal Board.

[54] In the first instance, it is not disputed that the Selangor Appeal Board took the unusual step of intimating to the parties at the hearing of the appeal that the appeal may be decided in favour of the second respondent on the question of whether Ampang Jaya Municipal Council had obtained the consent of the JKR Persekutuan to allow the applicant to connect to MRR2. It ignored the fact that the issue was not relevant or material to the appeal; its jurisdiction was to determine planning issues under s 22 of the TCPA and not to conduct an investigation into purported non-compliance of internal matters between JKR Selangor and JKR Persekutuan.

[55] It also transpired that prior to the decision fixed on 16 May 2012, a member of the Selangor Appeal Board Puan Hajjah Noraishah had called Ampang Jaya Municipal Council's planning officer and obtained a copy of the DPR relating to the proposed development. The fact that this incident was effected without the knowledge of the applicant calls into question the propriety of the same; no reasons were proffered by the Selangor Appeal Board as to why the applicant was not informed of this at the material time. On 16 May 2012, being the date fixed for the decision Puan Hajjah Noraishah raised the issue that the DPR for the proposed development was not in compliance with the requirements of TCPA and that on that score alone the second respondent's appeal will be allowed. The fact that this issue was not raised by the second respondent did not factor in the consideration of the Selangor Appeal Board. The fact that the date was fixed for decision also did not matter to the Selangor Appeal Board; instead, it adjourned the decision to 19 June 2012 to allow the applicant to adduce fresh evidence and documents to respond to the new issue.

[56] The decision date on 19 June 2012 was yet again adjourned to 2 August 2012 — this time on the new ground that the Selangor Appeal Board needed further clarification and on whether the applicant's land is located in an environmentally sensitive area. To compound the impropriety in the above cited instances, the Selangor Appeal Board once again adjourned the decision to 10 September 2012 — this time on three issues relating to DPR's compliance with s 21A of the TCPA, compliance with comments made by

IKRAM and incomplete TIA report. It is pertinent to note that none of these three issues were raised by the second respondent.

[57] The applicant was not given an opportunity to adequately prepare and answer the new issues which were raised by the Selangor Appeal Board on its own accord. The Selangor Appeal Board gave the perception that it was partial towards the second respondent. The decision making process at the hearing of the appeal before the Selangor Appeal Board has offended against the rule against bias. Taking all the above circumstances in its entirely, the court is drawn to the conclusion that the Selangor Appeal Board embarked on a course outside the purview of its statutory role and function as an appeal body to the extent that there was an apparent bias and lack of impartiality on its part.

Second ground — whether the Selangor Appeal Board committed any error of jurisdiction

[58] Learned counsel for the applicant submitted that in reaching the decision, Selangor Appeal Board acted ultra vires of the administrative powers. The court agrees with the submission that the Selangor Appeal Board had exercised its powers unreasonably, unfairly, irrationally and/or disproportionately by failing or refusing to take into account, inter alia, the following considerations:

(a) the fact that the DPR had complied with all the requirements of ss 21A and 21B of the TCPA;

(b) the fact that the DPR submitted was supported by other documents forwarded to Ampang Jaya Municipal Council before Ampang Jaya Municipal Council reached a decision pursuant to s 22 of the TCPA;

(c) the fact that ss 21A and 21B are general guidelines for r preparation of the DPR and the layout plan and do not necessarily apply to all development proposals;

(d) that 96.3% of the applicant's land is flat land covered in rubber trees and undergrowth;

(e) the DPR was prepared in accordance with ss 21A and 21B of the TCPA as well as the 'Development Proposal Report Manual' prepared by the Town and Country Planning Department and the Malaysian Institute of Planners;

(f) issues in respect of steps to protect and improve the physical environment and to conserve the natural topography of the area to be developed were set out clearly in the DPR;

(g) the layout plan was only a plan and steps to protect and improve the

physical environment and to conserve the natural topography of the area to be developed could not be stated in the layout plan;

(h) the DPR and the layout plan Reference No JPC/P09/182/Sel-GBK/108 were reviewed and approved by Ampang Jaya Municipal Council's specialised and technical departments comprising of the Director, Town Planning Department, Director, Engineering Department, Engineering, Building and Architecture Department, Landscape Architect, Director, Property Valuation and Management, Department Head, Urban Services Department and Director, Youth and Community Department;

(i) the DPR and the layout plan Reference No JPC/P09/182/Sel-GBK/108 were reviewed and approved by the Selangor Environmentally Sensitive Areas ('KSAS') Technical Development Committee;

(j) Selangor Appeal Board had without any cogent grounds decided to question the DPR and the layout plan which was a decision contrary to the decision made by planning experts in Ampang Jaya Municipal Council's technical departments and experts in KSAS all of whom have reviewed and approved the DPR and layout plan; and

(k) the second respondent submitted no expert reports whatsoever to support her allegations whereas the applicant had produced evidence through experts with in-depth knowledge in their fields of expertise.

Decision

[59] This also involves a review of the decision making process of the Selangor Appeal Board and not the merits – this is a typical ground for the control of discretionary power. The second respondent submitted at length on the merits of the decision of the Selangor Appeal Board; which submission was not particularly helpful in assisting the court in this review application.

[60] On a consideration of the affidavit evidence, the court is satisfied that the applicant's assertion as set out in sub-para (i) to (xi) above is substantiated. In particular, the Selangor Appeal Board chose to ignore the fact that all the relevant approvals and permits had been obtained by the applicant; instead and without any basis whatsoever, it took it upon itself the role to question the DPR and the layout plan – which was contrary to the decision made by the planning experts in both Ampang Jaya Municipal Council and KSAS. The Selangor Appeal Board also ignored the fact that the second respondent failed to produce any expert report whatsoever to substantiate her allegations. On the other hand, the applicant had produced all available evidence and reports of the relevant experts.

[61] In the circumstances aforesaid, the decision of the Selangor Appeal Board is tainted with illegality on the basis that it committed an error of law. The Selangor Appeal Board also conducted itself in excess of jurisdiction when it asked itself the wrong questions and took into account matters which it was not required to consider. It also appeared to have based its decision on these matters.

Third ground — whether the Selangor Appeal Board committed any error of fact and law

[62] The applicant referred to five instances of errors of fact and law. The first instance relates to the grounds of decision of the two non-legal members of the Selangor Appeal Board. In particular, their decision appears to suggest that the approval given by Ampang Jaya Municipal Council for the proposed development is not consistent with the land use zone made reference to the state structure plan, the land use strategic plan and the Ampang Jaya Municipal Council local plan. The court finds that this supposition is misconceived for the simple reason that the Ampang Jaya Municipal Council local plan which has already been *gazetted* stipulates that the applicant's land is for commercial use.

[63] Secondly, the Selangor Appeal Board made a finding that the proposed site poses a high risk to adjacent lands. This finding is inconsistent with the following facts: (i) the proposed development is located several kilometres away from the location where the landslides occurred; and (ii) the proposed development is situated on flat land as opposed to a hill slope development (reference is also made to the applicant's town planner's explanation in his affidavit encl 42 at para 12 and to the applicant's geotechnical engineer's affidavit in encl 25 at para 10.1 onwards). The affidavit evidence shows that the only slope involved is the one existing at the north-eastern corner of the proposed development site. The Selangor Appeal Board failed to consider the applicant's evidence that it is not and does not intend to develop the slope area in question. In ignoring this pertinent evidence, the Selangor Appeal Board failed to properly exercise its discretion as an appeal body.

[64] Thirdly, the Selangor Appeal Board also found that the applicant had failed to comply with ss 21A and 21B of the TCPA (para 23 of brief account of the salient facts above refers). Section 21A deals with DPR whereas s 21B deals with layout plans. As can be seen from the applicant's DPR, it can be inferred that the applicant has complied with the requirements of both sections. As such, the Selangor Appeal Board's finding is irrational and unreasonable.

[65] The fourth issue relates to the second respondent's contention that the proposed development will cause traffic congestion around the proposed

development site to be further congested. The Selangor Appeal Board found that traffic on the MRR2 has already reached saturation point even without the proposed development. It is significant to note that this point was never raised nor put to the applicant at the hearing of the appeal; to ascribe the planning as 'Ad Hoc' is misconceived because the access to the site has been planned as an integral part of the development vis a vis the MRR2 at the very beginning (see Puan Hajjah Norasiah's grounds of decision at pp 19 and 20 where it is stated that the development of the applicant's land is based on 'Ad Hoc Planning of the Proposed Site, Access Roads To MRR2'; and applicant's traffic expert's affidavit encl 26 at paras 8–10). The Selangor Appeal Board also appeared to have disregarded the TIA Report which was submitted to the relevant departments after which JKR Selangor had given its consent to connect its access from the proposed development site to MRR2. Another member of the Selangor Appeal Board Datin Teh Zawahir in her grounds also cast doubt on the TIA Report. That finding appears to be unsupported because according to the submission drawing, access from MRR2 to the proposed development is provided for directly from the MRR2; there is no interference with any junction of Jalan 1 or any road in Taman Sri Ukay (see para 11 of applicant's traffic expert's affidavit encl 26). More importantly, the Selangor Appeal Board has failed to appreciate the fact that the TIA Report is unchallenged or contradicted.

[66] The fifth and final issue relates to the second respondent's assertion that there is a waterfall or a natural water flow in the proposed development site. In the first place, this assertion was not corroborated by any evidence; there was only the oral evidence of the second respondent. In the second place, the Selangor Appeal Board failed to refer to any document or plans to support its finding that 'the arrangement of the elements of the development has not preserved the original river flow existing between the outside areas and the said proposed site especially lots adjacent to it and this amounts to non-compliance' (para 4.2 grounds of decision). According to a land survey carried out on the proposed development site, there is no such water feature. Since there is no such water feature, there is no necessity for the applicant to take any steps to preserve the original river flow. In short, the finding of the Selangor Appeal Board on this issue is clearly unsubstantiated and without basis.

[67] For the foregoing reasons there are serious errors of fact and law in the grounds of decision — so serious that it would render the decision so unreasonable that no reasonable body who applied their mind to the question to be decided could have arrived at it.

CONCLUSION

[68] For the reasons adumbrated above, the court finds that the decision of

the Selangor Appeal Board should be quashed. The decision is tainted with procedural impropriety on account of the apparent bias in favour of the second respondent. The decision is also illegal as it is tainted errors of jurisdiction in the decision making process — when it asked itself the wrong questions and took into account matters which it was not required to consider. Finally, the decision of the Selangor Appeal Board is flawed in the sense that it is also based on considerations which have been accorded undue weight and which on the evidence appears to be illogical and arbitrary.

[69] As such, the court made the orders of certiorari and mandamus on the terms as sought by the applicant.

Order accordingly.

Reported by Kanesh Sundrum